IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15-12-2004

CORAM :

THE HONOURABLE MR. JUSTICE A. KULASEKARAN

W.P. No. 34312 of 2004
and
W.M.P. No. 41444 of 2004
-o-

Guru Dev Enterprises
rep. by its Partner
M. Mohammed Rabi
No.1, 10th Street
Jothi Nagar, Tiruvottriyoor
Chennai - 600 019 .. Petitioner

Versus

1. The Chairman
   Tamil Nadu Electricity Board
   Anna Salai
   Chennai - 600 002

2. The Superintending Engineer
   V.E.D.C.
   Tamil Nadu Electricity Board
   Villupuram - 605 602

3. Sri Vinayaga Metals
   No.559, Nawab Hakkem Road
   Coimbatore - 641 001 .. Respondents

Petition filed under Article 226 of the Constitution of India praying for a Writ of Declaration as stated therein.

For Petitioner : Mr. S. Subbiah
For Respondents : Mr. G.Vasudevan for RR1 and 2

ORDER

The petitioner has come forward with this writ petition praying for a Writ of Declaration to declare that the auction held on 05-11-2004 by the second respondent, in respect to the sale of ferrous and non-ferrous materials, is without jurisdiction and null and void.

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2. The second respondent herein invited tenders from eligible persons for purchase of ferrous and non-ferrous scrap and other materials; that the petitioner herein has submitted his tender by quoting a sum of Rs.35,84,000/- and the tenders were opened on 05-11-2004 at 2.00 p.m. by the second respondent. According to the petitioner, subsequent to the opening of the tender and awarding of the contract, he came to know that the second respondent herein is not competent to call for the tenders as the first respondent herein has authorised only the Chief Engineers of the respective division under B.P. (FB) 273 Technical Branch dated 22-11-1996 and that the second respondent is not empowered to invite tenders in respect of scrap items and prayed to declare that the auction conducted on 05-11-2004 by the second respondent is without jurisdiction and null and void.

3. Mr. Subbiah, learned counsel for the petitioner submits that the powers to deal with the sale of the damaged articles under the provisions of the Tamil Nadu Electricity Supply Act LIV of 1948 are available to the Board, under the various Regulations called The Tamil Nadu Electricity Board Tender Regulations, 1991, but when under the said power, the powers delegated to the Superintending Engineer had been discontinued and entrusted with the Chief Engineers, the second respondent has no power or jurisdiction to call for any tenders or to deal with any articles; that the first respondent by proceedings dated 22-11-1998 had conferred the powers only upon the Chief Engineers and that the second respondent ought not to have been allowed by the first respondent to deal with those specified and notified articles; that the second respondent had abused his powers as Superintending Engineer and he has no power to bring in the sale of the notified items and prayed to declare that the auction conducted by the second respondent on 05-11-2004 in respect of ferrous and non-ferrous materials as void.

4. Per contra, Mr. Vasudevan, learned counsel appearing for the respondents 1 and 2 submits that auction notification was issued only by the Chief Engineer and that he had authorised the second respondent to receive and open the tenders, however, he alone is empowered to finalise the tenders and he has done so; that under the permanent B.P. (FB) 273 Technical Branch dated 22-11-1996 the Chief Engineer is delegated with the powers in respect of 12 items including copper; that the Chief Engineer only had directed the Superintending Engineer to open the tender and accordingly it was opened and a report was forwarded to the Chief Engineer; that the petitioner has participated in the tender and that his offer was not accepted, hence he has filed this vexatious writ petition; that the petitioner is not entitled to any remedy to stall the tender process as per the provisions of Tender Transparancy Act; that the Electricity Board exercised its powers conferred under Section 79 (g) of the Electricity Supply Act, 1998 in inviting tenders and prayed for dismissal of the writ petition.

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5. The word 'tender' imports not merely the readiness and the ability to pay or perform, at the time and place mentioned in the contract, but also the actual production of thing to be paid or delivered over. A mere offer to pay does not constitute a valid tender. The Law requires that the tenderer has the money present and ready to produce the actual offer to the other party. Tenderer means one who tenders his offer.

6. In this case, tender notice was invited by effecting publication in newspaper. The tender notice means only calling for quotations and for other details from the tenderers to help in the selection of tenderer or tenderers to do the work. Thus a tender notice does not amount to an offer or a proposal. It follows that the quotations of rates by tenderer's will not amount to an acceptance of the offer or proposal thereby creating any promise or agreement.

7. The tenders received from various persons were opened by the Superintending Engineer/second respondent herein on 05-11-2004 and forwarded the necessary items to the Chief Engineer.

8. In this case, the delegation of power given to the second respondent by the Chief Engineer has been explained in the counter filed by the second respondent and in respect of copper items, the second respondent was directed to receive the tender, open it and forward the same to the Chief Engineer, who is the authority to decide it. Hence, the averment of the petitioner that the second respondent is not competent to deal with the tenders is unsustainable in Law and answered against the petitioner.

9. Article 299 of the Constitution of India, which is correspondent to Section 175 (3) of the Government of India Act, 1925 prescribes any particular mode, by which the authority was to be conferred a right at a person to execute the contract. There is nothing in the said section itself to preclude authorisation being conferred adhoc on any person and when that was established, the requirements of the Section must be held to be satisfied. The Government or Government instrumentality can only bound by contract that are entered into in a particular way and which are signed by a proper authority.

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10. Until contract is entered into in a particular way and which are signed by the proper authority, it is not valid. Followed (Thawardas Pherumal and another Vs. Union of India) AIR 1955 SC 468 wherein it was held that 'it is well settled that the Governments can only be bound by contracts that are entered into in a particular way and which are signed by the proper authority'. Hence, allowing an authority to open the tender no way vitiates the tender process.

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11. Interference of the Court is possible only if the respondents violate Article 14 of the Constitution of India by

excluding the persons by discrimination. The General Rule is where the Government or Government instrumentality invites tender for a contract, it reserves the right to reject any tender even of the highest amount because it has the liberty to choose any person for awarding contract; but if the Government choose to exclude persons by discrimination or violates the terms and conditions or acts arbitrarily or unreasonably or contrary to the public interest, certainly the Court can interfere. Followed (M/s. Kasturi Lal Lakshmi Reddy etc., Vs. The State of Jammu & Kashmir and another) AIR 1980 SC 1992 wherein in Para-11, it was held thus:-

> "11. .....Every activity of the Government has a public element in it and it must therefore, be informed with reason and guided by public interest. If the Government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

12. The power of the Court to interfere is very limited. Followed (TATA Cellular Vs. Union of India) 1994 6 SCC Page No. 651, wherein in Para 73, 74, 82 and 152 it was held thus:-

> 73. Observance of judicial restraint is currently the mood in England. The judicial power of review is exercised to rein in any unbridled executive functioning. The restraint has two contemporary manifestations. One is the ambit of judicial intervention; the other covers the scope of the court's ability to quash an administrative decision on its merits. These restraints bear the hallmarks of judicial control over administrative action.
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> 74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision-making process itself.
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> 82. .....It is not the function of a judge to act as a superboard, or with the zeal of a pedantic schoolmaster substituting its judgment for that of the administrator.

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> The result is a theory of review that limits the extent to which the discretion of the expert may be scrutinised by the non-expert judge. The alternative is for the court to overrule the agency on technical matters where all the advantages of expertise lie with the agencies. If a court were to review fully the decision of a body such as state board of medical examiners 'it would find itself wandering amid the maze of therapeutics or boggling at the mysteries of the pharmacopoeia'. Such a situation as a state court expressed it many years ago 'is not a case of the blind leading the blind but of one who has always been deaf and blind insisting that he can see and hear better than one who has always had his eyesight and hearing and has always used them to the utmost advantage in ascertaining the truth in regard to the matter in question'.
>
> The second consideration leading to narrow review is that of calendar pressure. In practical terms it may be the more important consideration. More than any theory of limited review it is the pressure of the judicial calendar combined with the elephantine bulk of the record in so many review proceedings which leads to perfunctory affirmance of the vast majority of agency decisions."
>
> 152. We make it clear that we are not disturbing the other selections since the power of judicial review is not an appeal from the decision. We cannot substitute our decision since we do not have the necessary expertise to review."

13. In this case, the petitioner has not averred any discrimination. The only argument of Mr. Subbiah, learned counsel for the petitioner is that the second respondent is not competent to invite tenders, which was already answered negatively. Hence, it is necessary to be decided as to whether the petitioner is entitled to canvass the said point of alleged excess of jurisdiction of the second respondent after participation. The petitioner, having participated in the tender invited by the second respondent, this Court is of the considered view that it is not open to him to question the jurisdiction.

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Even assuming for the argument sake the second respondent is not vested with the jurisdiction, when it was not opposed by the petitioner before submitting his tender, it is not open after participation since, he abandoned his right of questioning it as it amounts to acquiescence. Acquiescence implies knowledge on their part and inaction in taking effective steps for protection of their rights. Acquiescence is not a question of fact, but by legal inference from the facts found. In M/s. Pannalal Binraj and others Vs. Union of India and others) AIR 1957 SC 397 the Honourable Supreme Court held in para-45 it thus:-

> "45. ....If they acquiesced in the jurisdiction of the Income-tax Officers to whom their cases were transferred, they were certainly not entitled to invoke the jurisdiction of this Court under Article 32. It is well settled that such conduct of the petitioners would disentitle them to any relief at the hands of this Court (Vide 'Halsbury's Laws of England', vol.II, 3rd Ed.. p.140, para 265: Rex v. Tabrum; Ex parte Dash, (1997) 97 L T 551 (U) O.A.O.K. Lakshmanan Chettiar v. Corporation of Madras, ILR 50 Mad 30: (AIR 1927 Mad 130) (V)"

14. In view of the said facts, I do not find any valid reason to interfere. The writ petition is devoid of merits, liable to be dismissed and accordingly it is dismissed. No costs. Consequently, connected WPMP is closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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1 cc to Mr. S. Subbiah, Advocate, SR. 55557

WP. NO. 34312/2004

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